

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1280

To be argued by
MARTIN B. McNAMARA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1280

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN NARVAEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

This is an appeal by John Narvaez from a judgment of conviction entered against him on June 1, 1977 after a trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment S 77 Cr. 133,* filed on March 22, 1977, in Count One charged Juan Ramon Vasquez, John Nar-

* Indictment S 77 Cr. 133 superseded Indictment 77 Cr. 133, which had been filed on February 18, 1977. The superseding indictment charged additional overt acts in Count One and changed the starting date of the conspiracy period from January 28, 1977 to October 1, 1975.

vaez, Luis Angel Reyes, Aurea Vasquez,* a/k/a "Gloria Montalvo," Pedro Lugo, Enriqueta Colon, a/k/a "Catina," Gabriel Urbina-Astorga and Jose A. Agosto-Concepcion, a/k/a "Indio," with conspiring, from October 1, 1976 until the date of the filing of the indictment, to violate the federal narcotics laws, in violation of Title 21, United States Code, Sections 846, 312, 841(a)(1) and (b)(1)(A). Counts Two, Three, Four and Five charged Juan and Reyes with distributing, respectively, 34.44 grams of heroin on January 3, 1977, 173.10 grams of heroin on January 7, 1977, 48.77 grams of heroin on January 12, 1977 and 457.63 grams of heroin on January 26, 1977, all in violation of Title 21, United States Code, Sections 812, 841(a)(1) and (b)(1)(A), and Title 18, United States Code, Section 2.

Trial commenced on April 6, 1977 as to Colon, Narvaez and Juan,** continuing on April 7, 11, 12, 13, 14

* Juan Ramon Vesquez is hereinafter referred to as "Juan." Aurea Vasquez is hereinafter referred to as "Aurea."

** Reyes pleaded guilty to Counts Three, Four and Five. On April 26, 1977, he was sentenced to concurrent terms of six years of imprisonment plus six years of special parole on each count.

Aurea pleaded guilty to Count One and on May 5, 1977 was sentenced to a term of seven years of imprisonment plus six years of special parole.

Lugo pleaded guilty to Count One and on June 9, 1977 was sentenced to a term of six years of imprisonment plus six years of special parole.

Urbina-Astorga pleaded guilty in the Northern District of Illinois to Count One of the present indictment pursuant to Fed. R. Crim. P. 20 and also to a Northern District of Illinois indictment charging one count of possession of two and one-half kilograms of heroin on February 8, 1977 with intent to distribute it. On June 29, 1977, he was sentenced in the Northern District of Illinois to a term of eighteen months of imprisonment plus three years of special parole on the Northern District of Illinois indictment and on the Southern District of New York indictment was placed on parole for a period of five years to commence after

[Footnote continued on following page]

and 18. On April 18, after deliberating for approximately one hour and forty minutes, with an interruption for a re-reading of the court's charge on conspiracy, the jury returned a partial verdict finding Juan guilty on Count One (Tr. 989-90).^{*} The jury was then excused for the day. (Tr. 991). On April 19, at the beginning of the day the jury returned a partial verdict finding Colon guilty on Count One and asked to hear again the tapes and transcripts on Narvaez. (Tr. 992-93). Approximately two hours and five minutes later, after hearing the Narvaez tapes and examining the transcripts, the jury returned another partial verdict finding Narvaez guilty on Count One. (Tr. 992-1009, 1014). Finally, approximately two hours later, after further deliberations and the reading of testimony, the jury returned a verdict finding Juan guilty on Counts Two, Three, Four and Five. (Tr. 1009-18).

On June 6, 1977 Judge Pierce sentenced Juan Ramon Vasquez to concurrent terms of ten years of imprisonment on each of Counts One, Two, Three, Four and Five, to be followed by three years of special parole. Colon was sentenced on June 2, 1977 to a term of three years of imprisonment, to be followed by three years of special parole. On June 1, 1977, Narvaez was sentenced to one year and one day of imprisonment, to be followed by three years of special parole.

the aforesaid special parole term, with the special condition that the defendant depart the United States and not return as an illegal alien.

Agosto-Concepcion pleaded guilty to Count One and on May 4, 1977 was sentenced to a term of eight years of imprisonment plus four years of special parole.

^{*} References preceded by "Tr." are to pages in the trial transcript; those preceded by "GX" are to Government exhibits at trial; and those preceded by "Br." are to the appellant John Narvaez' brief.

Narvaez and Juan are in custody pending appeal.* Colon is also in custody but has not appealed.

Statement of Facts

A. The Government's Case

1. Introduction

On four separate occasions in January, 1977 the defendants Juan Ramon Vasquez and Luis Reyes sold heroin to an undercover detective of the New York City Police Department. They sold one-half ounce on January 3, four and one-half ounces on January 7,** one ounce on January 12, and one full pound on January 26.

During the course of these dealings, Juan and Reyes stated to the detective that they were getting heroin from Chicago and that larger quantities were available if the detective wanted it. Accordingly, a meeting took place on February 1, 1977 at which Juan and the defendants Aurea Vasquez ** and Pedro Lugo agreed with two undercover detectives to arrange the delivery of four kilograms to the detectives in Chicago for a price of \$28,000 per kilogram. The defendants represented that they had both white heroin and brown heroin available and would

* By order of this Court dated November 17, 1977, the brief submitted by assigned counsel for Juan Ramon Vasquez was stricken. Accordingly, the appeal of Juan Ramon Vasquez will be heard at a later date.

** The brief for Narvaez incorrectly states that the January 7 transaction was for "four half-ounces." (Br. 4). The weight of the heroin actually sold on that date was 173.10 grams; the defendants had agreed to sell four and one-half ounces. (GX 23; Tr. 59).

** Aurea is the wife of the defendant John Narvaez. She is not related to the defendant Juan Ramon Vasquez.

provide five kilograms of heroin, four brown and one white, from which the detectives could choose and purchase four kilograms. The transaction was to take place on February 3 at a hotel in Chicago, with everyone returning to New York on the same day.

On February 2, however, the detectives learned from the defendant John Narvaez, Aurea's husband, and from Aurea and Juan themselves, that the deal would be delayed for an unknown period because heroin of bad quality had been received and turned back in Chicago. Finally, on February 5, Juan, Aurea and the two detectives traveled to Chicago.

In Chicago, the detectives, joined by an undercover DEA agent, were introduced to the defendants Enriqueta Colon and Jose A. Agosto-Concepcion.* It was agreed that the heroin would be delivered by Agosto at Colon's apartment. After additional delays by the defendants in making delivery, however, the New York defendants and detectives returned home, leaving their Chicago counterparts to complete the deal. On February 8, Colon and Agosto gave a sample of heroin to the undercover DEA agent, who agreed to accept delivery of two and one-half kilograms of heroin at a reduced price of \$25,000 per kilo.

Agosto then met with the defendant Gabriel Urbina-Astorga. After that meeting, Urbina-Astorga drove to Aurora, Illinois, under the surveillance of Government agents, picked up two and one-half kilograms of heroin and drove back to Chicago. Pursuant to a search warrant for Urbina-Astorga's car, agents seized the two and one-half kilograms, with the arrests of all defendants following.

* Jose A. Agosto-Concepcion is hereinafter referred to as "Agosto."

2. The January Heroin Sales and Negotiations

On December 23, 1976, in the presence of Detective Stephen Caracappa of the New York City Police Department, an informant telephoned Juan Ramon Vasquez. After the informant introduced Caracappa to Juan over the telephone, Juan said that he had heroin available to sell at a price of approximately \$1,500 an ounce. Juan asked Caracappa to come to Juan's apartment to discuss it further, and Caracappa said that he would at a future time, possibly after the New Year's holiday. (Tr. 50, 1228-30).

Subsequently, on January 3, 1977, Juan met with Caracappa in Caracappa's auto on 14th Street between Avenue C and Avenue D in Manhattan. At that meeting, Juan said that he didn't have a full ounce available at the time, but would sell a half-ounce to Caracappa for \$750.00. (Tr. 51-53, 221, 230-32, 235, 237-38, 270, 547-48).

Approximately twenty minutes later, Caracappa went to the River Bend East bar and met again with Juan, who introduced Caracappa to the defendant Luis Angel Reyes. (Tr. 53-54, 57, 232-34, 371-72, 574-75). Reyes then handed Caracappa the half-ounce of heroin in a small, clear plastic packet, and Caracappa handed Reyes \$750.00. (Tr. 54-55; GX 1, 23).

On January 6, 1977, Caracappa again met with Juan and Reyes, this time at Feathers Restaurant. Juan said that they had just received 2½ kilos from Chicago, and they then agreed to sell four and one-half ounces of heroin to Caracappa for \$6,300 the next day. (Tr. 58-59, 238-41, 268-69, 271, 548-49).

On the next day, as agreed, Caracappa met Juan and Reyes at Feathers Restaurant and purchased the four

and one-half ounces of heroin. (Tr. 59-61, 241-43, 268-71, 368-69, 550, 570-71; GX 2, 23). During this meeting, Juan and Reyes said they were getting the heroin from Chicago for about \$1,000 an ounce and that in the future they could talk about larger purchases. (Tr. 61, 243-44). Caracappa said he would think about going to Chicago and would speak to them about it the next time he saw them. (Tr. 61-63, 245-46, 550).

Caracappa next met with Juan and Reyes on January 11, 1977 at Juan's apartment, at 713 East 9th Street in Manhattan, and agreed that he would return the next day to buy one ounce of supposedly new and better quality heroin for \$1,500. (Tr. 65-66, 249-50). Caracappa also said that he had spoken to some people about buying five ounces in Chicago and that he was willing to put up \$5,000 plus half of the expense money. When Reyes responded that the least Caracappa could buy in Chicago was twenty-four ounces at one time, the detective said he would have to check with his people about that. (Tr. 67, 249-50, 272).

On January 12, Caracappa returned to Juan's apartment and purchased the ounce of "new material" as agreed upon. (Tr. 69-70, 251-54, 267-68, 552; GX 3, 23).

Two days later, Caracappa telephoned Juan and complained that the quality of the January 12 ounce of heroin wasn't very good. Juan told Caracappa not to worry about it, that Juan would make it up to Caracappa and that from then on Caracappa would deal directly with Juan's people. (Tr. 71).

Next, on January 25, 1977, Caracappa met with Juan and Reyes at Juan's apartment. At Juan's urging, Caracappa agreed to buy a full pound of heroin for \$1400 an ounce. (Tr. 73, 254-56, 269-70, 552-53).

On January 26, pursuant to their agreement of the day before, Caracappa went to Juan's apartment (Tr.

77, 258), where he met with Juan and Reyes, received sixteen one-ounce packets of brown heroin and paid \$22,400. Before Caracappa left the apartment, Juan told the detective to call him about a larger purchase. Caracappa said he would come back in a few days. (Tr. 78-81, 258-60, 278, 391-93, 555; GX 4, 23).

Accordingly, on January 28, Caracappa again went to Juan's apartment, bringing along Detective Bruno, who was introduced as Caracappa's cousin, John. The detectives said they were fairly satisfied with the pound of heroin Caracappa had purchased and were looking for more material. Juan said he believed they could get heroin in Chicago for \$800 an ounce and that he would get in touch with his brother-in-law Dino to make arrangements for a trip to Chicago to buy heroin. (Tr. 82-85, 277, 388, 394-98, 438-41, 572).

Detectives Caracappa and Bruno next met with Juan and the defendant Pedro Lugo on January 31, 1977, again at Juan's apartment. After Juan introduced Lugo to the detectives as one of his "workers," Lugo handed \$1,300 to Juan, which Juan counted and put in his pocket. (Tr. 85, 279, 398-99, 439-41).

Lugo said that in August the price for heroin in Chicago had been \$28,000 per kilo. Bruno asked Lugo if they could get seven or eight kilos. Lugo replied that would be no problem, but that for the first time the detectives should buy only three or four kilos to evaluate the quality. He then said that he was going to find out from "the lady" the current price of a kilo in Chicago and would call them. (Tr. 86, 279, 282-83, 399-400, 441-43).

Lugo left the apartment but telephoned in 10 to 15 minutes and told Caracappa that he was with "the lady," that she was going to make arrangements to go to Chicago to purchase three kilos at \$28,000 per kilo, and that they would meet with the detectives the next day to discuss

it further. After the phone call, Juan told the detectives that they would meet the next day at Juan's house and go out to eat and talk about the heroin purchase. (Tr. 87, 280, 283, 400-01, 443).

3. The February 1 Meeting

On the next day, February 1, 1977, Caracappa met with Aurea Vasquez, Pedro Lugo, Lugo's wife, Juan, and Juan's wife Neldy Garcia at Juan's apartment. Aurea told Caracappa that she was the woman who was going to make arrangements to go to Chicago and that in Chicago they had some white "material" available as well as brown. (Tr. 88, 284).

After Detective Bruno, who was wearing a concealed Nagra tape recorder,* had joined the group, everyone went in two cars to Francesco's Restaurant on York Avenue in Manhattan for dinner. Bruno, Caracappa, Lugo and Juan traveled together in one car and the women traveled together in the second car. (Tr. 89, 401-03, 443-44).

In conversation tape recorded in the car on the way to the restaurant, Juan told the detectives that he had been told that you could "cut" the white heroin available in Chicago two or three times. (GX 10A). Lugo agreed that the deal would be ready for February 3, and Juan said that the price was set at twenty-eight. (Tr. 314-21; GX 10B, 10C). The detectives said that they would send the purchase money to Chicago ahead of them. (GX 10C). Both Juan and Lugo assured the

* Initially, the Government offered the entire Nagra tape and a transcript of the tape. (Tr. 95; GX 9, 10). In response to defendants' objections and a suggestion by Judge Pierce, however, the Government reduced its offer to selected portions of the tape and transcript. (GX 10A, 10B, 10C, 10D).

detectives that the detectives would hold the money until the heroin had been delivered and its quality tested, that the heroin would be delivered to them at a hotel, and that the transaction would be quick and business-like "like in Wall Street." (GX 10C, pp. A23, A26).

At the restaurant, in the presence of Juan, Lugo and their wives, the detectives again stressed to Aurea that the purchase money was going to be sent to Chicago with one of the detectives' associates on February 2 and that it was important that the deal take place quickly and smoothly. (GX 10D; Tr. 93, 323). Aurea assured the detectives that the deal would take place at a hotel and that they would return to New York the same day. Caracappa then told her to order five kilos of heroin in Chicago and that, if the white looked good, the detectives would buy one kilo of white and three kilos of brown heroin. (Tr. 90, 286-92, 404-05, 445-47).

4. Delay and the Narvaez Telephone Calls

On the next day, however, February 2, 1977, in a telephone conversation with Juan, the detectives were told that there was a problem in Chicago because the heroin was no good and that Juan was waiting to hear further from Aurea.

Then, trying to contact Aurea, Caracappa spoke to Aurea's husband, the defendant John Narvaez, on the telephone. Narvaez immediately asked if Caracappa was the guy from "yesterday" (i.e. Francisco's). After Caracappa said he was, Narvaez explained that heroin of bad quality had been received and turned back in Chicago and that he didn't know how long the deal would have to be delayed but that it would be "a while . . . maybe another week or month." Caracappa, in his undercover role, pretended to be "agitated" with Narvaez over the delay, and Narvaez said that he was waiting for the people in Chicago to call, that he didn't know when Chicago would call, but Caracappa could ". . . give me a

call. See what happens." (Tr. 102-115, 293-94, 327-28, 342, 411; GX 11, 12).

Later on the same day, in another call to Narvaez' and Aurea's home, Bruno spoke to Juan and Aurea, who said they were still waiting to hear from Aurea. (GX 14).

Next, in the third call of the day to Narvaez and Aurea's house, Narvaez answered, volunteered that the Chicago people hadn't called back yet and said he didn't know, but maybe they would call that night or the next morning. Then, after Caracappa had four times asked to speak to Aurea, Narvaez finally gave the phone to her, and she confirmed what Narvaez had told Caracappa. (GX 16).

*The conversation between Caracappa and Narvaez was as follows (GX 12):

Oper: At the tone standard time will be 3:31 and 20 seconds.

Det. C: Huh, this is Det. Stephen Caracappa, N.Y.D.E.T.F. Today's date is February 2, 1977. I'm placing a call to telephone number, area code 212-677-6694 regarding case # CT 76-0259. I'm going to be asking for a female by the name of Gloria, possible last name Montalvo.

John: Hello.

Det. C: Hello, is Gloria there?

John: No.

Det. C: Did she come back yet?

John: No.

Det. C: What time do you expect her?

John: Anytime. But whose's this? It this the guy from yesterday?

Det. C: Si, Si, Yea.

John: No they ain't going to do it.

Det. C: Yea, well what seems to be the problem there? You know like who's this?

John: Huh? This is her husband.

Det. C: Yea, well listen man, I don't know you. You don't know me.

John: Right.

Det. C: But I tied up a lot of bread in this thing.

[Footnote continued on following page]

- John: Inaudible
- Det. C: A lot of people I had to pull people back. I mean, can it be done later or why what am I going to tell my people.
- John: I don't think they're going to do it.
- Det. C: Why?
- John: They can't. It's no good. They turned it back themselves.
- Det. C: On, they turned the stuff back? I mean is there any chance—is the stuff going to come out? I mean, you know, what am I going to do with this money? I'm into for a lot of money. We had to take some money off some shys. It's costing me over a grand a day to keep the money out. I don't know whether to hold it or turn it back in. You know I'm in a bad position now.
- John: Inaudible—It's true it's going to be for a while. You may as well try some other place. You know, I don't know I'm waiting for these guys to call, but they haven't called.
- Det. C: So in other words, the stuff went bad over there.
- John: Yea.
- Det. C: Jesus Christ Almighty—because you know we were going to go today.
- John: Huh, huh.
- Det. C: And I put it off for another day. Now I had to get the guy. I can't even get the guy. I got a guy on his way there now with my bread. You know I'm upset. My people are upset. Don't get me wrong.
- John: I know.
- Det. C: I don't know who the fuck to turn to now. Here I'm I order I order over there—inaudible—but am I going to get it? What do I do now? What do I tell my people with all this fucking money out? Well I don't know when do you expect to hear from these people.
- Det. C: Is there anything that they can do for me or is it just that bad?
- John: Huh, they turned it back completely.
- Det. C: The whole thing.
- John: Yeah.
- Det. C: When is the next one coming in? Maybe we could—I could keep my man out there. I can't be sending that money back and forth.

[Footnote continued on following page]

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- John: Huh, no, I really wouldn't know, I'm pretty sure it will be a while. You know maybe another week or month. Who knows.
- Det. C: Another week or month? How much stuff could they have turned back?
- John: I really don't know.
- Det. C: You don't know?
- John: The amount.
- Det. C: Alright. I'll have going to have to talk to my man over here and see what, what then everything had to be dried up. It's all coming from the same dam place. Jesus Christ Almighty.
- Det. C: Alright, huh, when are they going to call you?
- John: Yea.
- Det. C: You think I can get some more information later on?
- John: I don't know. Huh, look give me a call. See what happens.
- Det. C: O.k. What's your name?
- John: Johnny.
- Det. C: Johnny, huh? This is Frankie. Frankie Flaco.
- John: Alright.
- Det. C: Alright, I'll call you in about an hour, an hour and a half.
- Det. C: Alright, Bye, bye.
- John: Bye.

At 5:45, detective Bruno placed a second call to the home of Aurea and Narvaez. He spoke to Aurea and Juan (GX 14), who said that they were waiting to hear from Chicago.

Finally, at approximately 9 P.M. the third tape of the day was placed to the home of Aurea and Narvaez, with Caracappa speaking to John Narvaez as follows (GX 16):

- Det. C: The time is approx. 9 o'clock, today's date is February 2, 1977. I'm placing a call to Gloria Montalvo at telephone number 212-677-6694 regarding the negotiations for the purchase of Ex. 5 in Chicago case number C.T. 76-0259. This is Det. Stephen Caracappa shield # 3240, N.Y.D.E.T.F.

Johnny: Hello.

Det. C: Hello, huh, Gloria. [Noise in background—pause]

Johnny: They haven't called back yet these people.

Det. C: Huh, huh, alright, are they going to call back tonight because I got to bring that man back.

Johnny: I don't know, I really can't give you no, maybe tomorrow morning or tonight, you know.

[Footnote continued on following page]

On the next day, February 3, 1977, with the delay continuing, Bruno telephoned Juan and recorded their conversation. (Tr. 416-18; GX 17, 18). Bruno complained that he had borrowed \$120,000 for the transaction and was in an "embarrassing" position. Juan said that there was still a delay in Chicago, that he was waiting to hear from Aurea, but that the transaction still would take place. (GX 18).

On February 4, 1977, in a recorded meeting at Juan's apartment,* and in recorded telephone calls, Juan and Aurea told the detectives that they would all go to Chicago and the heroin transaction would take place for four kilograms on the next day. (Tr. 137-42, 297-99, 421-25, 575; GX 21, 22).

5. The Trip to Chicago and Seizure of 21/2 Kilos

On February 5, 1977, Bruno, Caracappa, Juan and Aurea flew to Chicago. (Tr. 149, 299, 342, 426, 576-77). At the airport in Chicago, the group was met by undercover agent Frank Tucci of the Chicago DEA office,

Det. C: Alright is Senorita Gloria there?

John: Huh?

Det. C: Is Senorita Gloria there?

Johnny: What was that?

Det. C: Is Gloria there?

Johnny: Yea.

Det. C: Let me talk to her.

* * *

Caracappa then spoke to Aurea, who said she was hoping to hear from Chicago later that night or the next morning. Caracappa said he would call again the next morning. (GX 16).

*The entire Nagra tape recording and a transcript thereof (GX 19, 20) were identified in court and made available to defense counsel. (Tr. 139-41). Portions of the tape and transcript (GX 20A, 20B, 20C, 20D, 20E and 20F) were offered and received into evidence.

posing as the person Caracappa had sent ahead with the money from Philadelphia. (Tr. 149, 426-27, 449, 456-59).

After a wait at the Essex Inn Hotel in Chicago, Aurea said that the "people" were there but that they wanted to do the deal in another place. (Tr. 150-51, 300, 343-44, 428-29, 449-50). Accordingly, Caracappa and Aurea went to the defendant Enriqueta Colon's * apartment at 3126-3128 West Cortland in Chicago.**

From the apartment, Caracappa, Aurea and Colon went with Tucci *** to a Chicago bar, Luis Pump Tavern, to meet with the "connection." At the bar, Aurea met separately with a man, then told Caracappa that "the people" did not have the heroin yet but wanted the money in advance. Caracappa refused to give up the purchase money until he saw the heroin, and the meeting ended. (Tr. 151-58, 353-58, 430-31, 461-65, 496-97, 500-502, 586, 617-19).

On the way back to the hotel, Aurea told Caracappa she was sorry, that the people sometimes didn't get "material" when they expected it and that she had once waited in Chicago for two weeks for a delivery. (Tr. 159, 303, 359-61).

At the hotel, Aurea telephoned "Indio," the defendant Jose A. Agosto-Conception, who agreed on the phone with Caracappa to deliver five kilos of heroin to Cara-

* Aurea said Colon was well trusted, that she was the first wife of a New York heroin dealer referred to as the "old man" and that deals had been done in her apartment before. (Tr. 151-55, 201, 347, 585).

** Juan and detective Bruno remained at the hotel throughout their stay in Chicago. (Tr. 301-02, 430, 433-34, 450).

*** After Aurea and Colon spoke on the phone at Colon's apartment with their "connection," Caracappa phoned Tucci and had him come to the apartment in a cab.

cappa the next day at Colon's house, with Caracappa to pay \$28,500 per kilo for four kilos and receive one kilo on consignment. Agosto said he would have to send out of town for the heroin and would be in touch with Aurea through Colon when the heroin had arrived. (Tr. 160-62, 303-04, 363, 431-33).

On the next morning, February 6, 1977, Caracappa and Aurea returned to Colon's apartment to await delivery of the heroin. When the heroin didn't appear, Agosto, first by telephone and then in person at Colon's apartment, told Caracappa that he didn't know what had happened, but that there would be no problem and delivery was only a matter of time. (Tr. 162-68, 364-67, 433-34, 472-74, 606-08, 619).*

Caracappa then said to Agosto that he was going back to the hotel and would have to talk to some people about keeping the money in Chicago. Subsequently at the hotel, after conferring with other agents, Caracappa had Aurea give a phone number to Colon at which Tucci could be reached. Caracappa, Bruno, Aurea and Juan then returned to New York, leaving their respective Chicago associates to complete the transaction. (Tr. 168-69, 307-08, 435-38, 451-53).

On February 7, after several telephone calls between Tucci, Colon and Agosto, Agosto told Tucci that he had

* Agosto said that he was the "connection" for Colon's first husband, the "old man," that he had had three sources direct from Mexico, that he sold "material" of the best quality just the way he got it, uncut, and that the price would be lower and the "material" delivered to Caracappa in New York after they had done business for a while. When Agosto also said that he had a few weeks earlier been left \$3,000 short on the payment for a shipment to the "old man," Caracappa called Tucci, who met with Caracappa, Agosto and Aurea on the street corner by Colon's house and showed Agosto the \$110,000 roll of purchase money. (Tr. 165-68, 305-06, 367, 473-74, 502-04, 536-37, 607-08, 619-20).

two and one-half kilograms of heroin which he could deliver immediately, but that there wasn't a lot of "sugar" in the "candy," meaning the quality of the heroin was not good. Tucci said he would have to borrow a car and would call Agosto the next morning. (Tr. 474-78, 504-10).

On February 8, 1977, Tucci met with Agosto and Colon at Colon's apartment, where Agosto gave Tucci a heroin sample wrapped in aluminum foil and said that the price of the heroin would be lowered to \$25,000 per kilo because the quality was not as good as promised. Colon added that the sample was of the same quality as the two and one-half kilos. Then, after leaving the apartment and testing the sample, Tucci telephoned and accepted the proposed deal. (Tr. 478-81, 511-17, 529-30, 532-36, 586-87, 608-09, 614-15, 620-21; GX 5, 23). Thereafter, about noon, Agosto drove by Colon's house in a car with the defendant Gabriel Urbina-Astorga and another man. Then, fifteen minutes later, Agosto told Tucci that his people had gone to pick up the heroin. (Tr. 484-85, 517-520, 587-88, 610-11).

Meanwhile, other agents conducted surveillance of the two men with whom Agosto had driven past Colon's apartment. The two drove in separate cars and by separate routes to the same house in Aurora, Illinois, outside of Chicago. There, the defendant Urbina-Astorga picked up and placed in the trunk of his car a package which proved to contain 3138.0 grams of heroin. After maintaining surveillance of Urbina-Astorga and the heroin package as the defendant returned to a bar in Chicago, the agents seized the heroin from the trunk of Urbina-Astorga's car pursuant to a search warrant. (Tr. 588-91,

611, 621-24; GX 6, 23). Thereafter, all of the defendants were arrested.*

Subsequent to arrest, the defendant Narvaez made a pre-arraignment statement to an Assistant United States Attorney.** (Tr. 592; GX 8).

B. The Defense Case

The only defendant to present a defense was Juan Ramon Vasquez, who testified in his own behalf. As to the four January, 1977 heroin deliveries to Agent Carracappa, Juan admitted to being present, but claimed that Reyes had sold the heroin and that he, Juan, had received no money from the transactions. (Tr. 692-94, 697-99, 701-08). Juan similarly claimed that he was merely present on the trip to Chicago, having agreed to go only because Carracappa offered him \$5,000 to come along for protection. (Tr. 701-02, 705, 708-09).

* From about 2:00 p.m. to 6:00 p.m., Tucci and Kenneth Rhodes, another undercover DEA agent posing as a heroin dealer from Philadelphia, waited with Agosto and Colon at Colon's apartment for delivery of the heroin. During the wait, Agosto made numerous phone calls and told the agents that the man who was bringing the heroin was having trouble with his car. Finally, at approximately 6:00 p.m., Tucci and Rhodes left Colon's apartment, with Tucci saying he would call later. (Tr. 485-89, 520-23, 611-12, 615-16).

** That statement, in pertinent part, was as follows (GX 8):
 "I didn't know much about this whole thing at all. I've never been to Chicago or left N.Y., in fact. Aurea could verify that I really didn't know what was going down on this.

"I knew she was going to Chicago; I found out, after she came back, why she went. This was before arrest. They came back Sunday or Monday. I got mad behind it. She waited until it was over with, to tell me what she had done."

ARGUMENT

The Evidence Against Narvaez Was More Than Sufficient.

The defendant John Narvaez argues that the proof against him was insufficient. In testing that claim, this Court must view the evidence against Narvaez in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Gerry*, 515 F.2d 130, 134 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Floyd*, 496 F.2d 982, 987 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1975); *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). Thus, the standard for review is

“whether upon the evidence, giving full play to the right of [the trier of fact] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.”

United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977); *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *accord*, *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States v. Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972).

The existence of a conspiracy to distribute heroin was shown by overwhelming proof at trial. That proof included the testimony of four different undercover agents and their back-up surveillance agents to extensive negotiations at numerous times and places with the various co-conspirators for a large scale purchase of Chicago heroin; tape recordings and transcripts of substantial and telling portions of those negotiations; and six heroin exhibits themselves, four packages sold to Caracappa in New York during January, a fifth sample given to Tucci in

Chicago and the sixth exhibit, a package containing over 3,000 grams of heroin, seized from a defendant's car at the climax of the negotiations in Chicago.

Thus, in assessing John Narvaez as a conspirator, the focus must be on "... the qualitative nature of the actor or acts ... in the context of the entire conspiracy," *United States v. Taylor*, Dkt. Nos. 76-1210, 1256, 1264, 1265, 1266, 1288, slip op. 2805, 2811 (2d Cir. April 13, 1977); accord, *United States v. Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974), bearing in mind that "... once a conspiracy is shown, only slight evidence is needed to link another defendant with it." *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974); accord, *United States v. Dearden*, 546 F.2d 622, 624 (5th Cir. 1977); *United States v. Perry*, 550 F.2d 524, 529 (9th Cir. 1977). John Narvaez' recorded telephone conversations,* then, must be viewed in terms of the crucial time at which they come in this conspiracy, where, as Judge Pierce found, "... communications were of major importance and the court could draw the inference that Narvaez was at the very nerve center of the New York end of the conspiracy charged." (Tr. 649).

* The principal evidence against Narvaez was two recorded telephone conversations with detective Caracappa on February 2, 1977. (GX 11, 12, 15, 16).

In the exercise of his discretion, although noting that the Government was not "out of the ball park," Judge Pierce excluded the recorded statement of Juan Ramon Vasquez in the presence of Aurea Vasquez and the detectives that Caracappa's telephone calls to Aurea would not be taken by her husband as a sign of disrespect because John Narvaez "knows all the angles." (Tr. 192). Similarly, the Government withdrew its offer of a co-conspirator's recorded statement that Narvaez had recently gotten out of jail, and Judge Pierce excluded from evidence Narvaez' post-arrest admission that he was unemployed at the time of the conspiracy. (Tr. 121-22, 580-83).

On this point, it must be noted that this conspiracy pointed to a very large transaction for over one hundred thousand dollars worth of heroin, and that transaction was projected as but a first step in a continuing series of major heroin deals. (Tr. 17, 18-20; GX 10C, p. A26, 18, pp. F5-F6). Also, the undercover detectives here, in their roles as heroin buyers, had repeatedly insisted that the Chicago transaction must be businesslike and efficient, a quick trip to Chicago with no time wasted. (Tr. 323; GX 10C, pp. A23, A26, 10D, p. A38). This posture of the detectives fit the context of this, their first transaction in Chicago, involving some conspirators the detectives had never before dealt with directly and some they had never even met. Finally, of course, there was the inherent importance of communications in this interstate transaction, where the buyers were in New York, the heroin in Chicago, and the purchase money in Philadelphia with a separate courier who would travel to Chicago at the time fixed for all parties to converge and complete the deal. (Tr. 93, 323; GX 10D).

Secondly, it must be noted that Narvaez surfaces at what is *the* crucial turn in the heroin negotiations to that point. All that had gone before—the negotiations and purchases from Juan and Reyes, the meeting with Lugo at Juan's house, the dinner meeting with Aurea, Juan and Lugo at Francesco's—had been a gradual building process, an evolution of negotiations leading easily forward for both sides.* On February 2, however, there is a very serious disruption in the agreed-upon plans. The conspirators can't deliver the heroin and must delay the transaction indefinitely, after the detectives had

* Thus, as shown particularly by the recorded conversations in the car on the way to Francesco's and at Francesco's itself the major terms—price, quantity, "businesslike" conditions—were largely understood and accepted without difficulty by all parties. (GX 10A-10D, 20A-20F).

already sent \$120,000 by courier to Chicago, and despite the detectives' constant insistence that there be no time wasted and the deal be swift and businesslike. That crucial delay is given to John Narvaez to explain.**

In that context, then, attention must be given to what Narvaez actually said to Caracappa. First, when Narvaez answered the phone and Caracappa without identifying himself asked for Aurea, Narvaez jumped right in and asked, "Is this the guy from yesterday?" (GX 12, p. C1). "Yesterday" referred, of course, to the meeting at Francesco's, demonstrating that Narvaez had knowledge of that meeting.

Next, as soon as Caracappa acknowledged that he was the guy from yesterday, Narvaez said, "No they ain't going to do it." (GX 12, p. C1). Caracappa did not lead Narvaez into conversation about Chicago; Narvaez took the initiative. Narvaez could simply have said that Aurea wasn't home and asked the detective to call back later. Instead, he immediately led the detective into conversation about the heroin transaction in Chicago. And, of course, in so doing Narvaez showed knowledge of the substance of the Francesco's meeting.

At that point, Caracappa said, "Yea, well listen man, I don't know you. You don't know me." Without question or hesitation, Narvaez acknowledged the need for secrecy and responded, "Right." (GX 12, p. C1).

Then, as Caracappa complained that he had sent his money and people to Chicago, Narvaez explained, "I don't think they're going to do it They turned it

** Juan had advised the detectives earlier on February 2 that there was a problem, but had referred the detectives to Narvaez' wife, Aurea, for details and explanation. (Tr. 102-03).

back themselves." (GX 12, p. C2). Caracappa pressed his complaint, saying: *

"Oh, they turned the stuff back? I mean is there any chance—is the stuff going to come out? I mean, you know, what am I going to do with this money? I'm into for a lot of money. We had to take some money off some shys. It's costing me over a grand a day to keep the money out. I don't know whether to hold it or turn it back in. You know I'm in a bad position now." (GX 12, p. C2).

Then, in a central passage of the conversation, Narvaez responded,

"Inaudible—It's true it's going to be for a while. You may as well try some other place. You know, I don't know *I'm waiting for these guys to call*, but they haven't called." (GX 12, p. C2; emphasis added).

The key phrase in the passage is: "I'm waiting for these guys to call." Thus, Narvaez confirmed his direct, personal role in the essential communications to Chicago.**

Before this Court, Narvaez, however, emphasizes the preceding sentence, "You may as well try some other place."*** First, that statement is substantially undercut

* On cross-examination at trial, Caracappa testified that in his undercover role he pretended to be "agitated" at the delay in this four kilo heroin deal. (Tr. 327-28).

** In ruling on motions at the close of the Government's case, Judge Pierce characterized Narvaez as "a knowing and willing communications link. . . ." (Tr. 649).

*** On the question of emphasis, it should be noted that the jury heard the recorded conversation twice, once during trial and once during the jury's deliberations which preceded its guilty verdict as to Narvaez. (Tr. 205-08, 992-93).

by the statement that follows right on its heels that, "I'm waiting for these guys to call." Narvaez did not give Caracappa a chance to consider or respond to the "try some other place" remark, but rather plunged right back into discussion of the pending Chicago deal. Indeed, taken in context, the "try some other place" remark appears not as any sort of genuine disclaimer, but at most as a negotiating ploy, an effort by Narvaez to put some space between himself and the "agitated" Caracappa. Moreover, that remark came in the context of negotiations for well over one hundred thousand dollars worth of heroin. Both parties well knew that they could not simply "try some other place" for such a deal. Thus, Narvaez' remark served as a reminder to Caracappa that Caracappa needed Narvaez, too, and that even if there were some delays, sources of five kilograms of heroin are limited and valuable to a buyer.

In the rest of the conversation, Narvaez said that he knew the plan was to go to Chicago that day (GX 12, p. C2), that he did not know the amount of heroin turned back (GX 12, p. C3),* and that the delay "will be a while. You know maybe another week or month. Who knows." (GX 12, pp. C2, C3).**

* Narvaez clearly knew as much about the problem in Chicago as anyone in New York at the time. As the other recorded February 2 conversations make clear neither Juan nor Aurea knew the amount of heroin that had been turned back or when more information would be received from Chicago or a new supply of heroin would be available. (GX 13, 14, 15, 16). Indeed, since the conspirators had to use interstate telephone connections, it is not at all surprising, we submit, that communications were limited to basic and necessary information.

** As Judge Pierce noted (Tr. 648), the setting of a specific time frame for the delay is geared to completion of the transaction, rather than abandonment. Moreover, the delay suggested by Narvaez of "another week or month" is not at all unrealistic or ill-informed in view of the fact that, as a heroin courier, Aurea

[Footnote continued on following page]

Finally, when Caracappa asked if he could get more information later on, Narvaez said, "I don't know. *Huh, look give me a call. See what happens.*" (GX 12, p. C4; emphasis added). Thus, Narvaez ended the conversation on a positive note, keeping the deal alive while gaining time for solution of the problem in Chicago.

Later on February 2, Caracappa again called the home of Aurea and Narvaez. (GX 15, 16). When Narvaez answered the phone,, Caracappa asked for Aurea.* Rather

herself had waited as long as two weeks in Chicago for a delivery when poor quality heroin had to be turned back and replaced. (Tr. 159; GX 20F).

The clear showing by Narvaez here of substantial knowledge of the conspiracy distinguishes this case from cases such as *United States v. DiStefano*, 555 F.2d 1094 (2d Cir. 1977), relied on here by Narvaez (Br. 14, 21), where this Court decided whether a defendant at the time of her allegedly incriminating act or acts knew that there was a larger criminal conspiracy into which her action fit.

Thus, in *DiStefano*, the defendant Linda DiStefano was alleged to have "cased" a bank by checking to see if a guard was present and if the bank cameras had been moved prior to the robbery of the bank by her sister and others. The Government's accomplice witness, Edwards, however, who presented the only evidence against Linda, testified that they did not discuss the proposed bank robbery in the car on the way to Linda's alleged casing of the bank because a third party was with them, that he did not know or could not remember how he told Linda what to do in the bank, and that Linda upon her returning from the bank had indicated by "a nod or something like that" that there was no guard and the cameras had not been moved. This Court held, "Under the circumstances, the evidence is insufficient to support the inference that Linda knew that a bank robbery was planned and intended to participate in it. . . ." 555 F.2d at 1103. Here, by contrast, the facts show that Narvaez not only knew about the conspiracy, but that his knowledge of events was as complete as that of even Juan and Aurea at the time when he spoke to Caracappa.

* Aurea is also known as Gloria Montalvo. (Tr. 88, 402).

than simply handing the phone to Aurea,* however, Narvaez volunteered, "They haven't called back yet these people." ** (GX 16, p. E1). Again, Caracappa did not mention Chicago or lead Narvaez into conversation; Narvaez jumped in.

Then, when Caracappa asked if "they" were going to call that night, Narvaez responded, "I don't know, I really can't give you no, maybe tomorrow morning or tonight, you know." (GX 16, p. E1). Again, Narvaez struck a positive note, remaining flexible but trying to further the situation and keep it going until the next morning. Then, only after Caracappa *four* times repeated his request to speak to Aurea, did Narvaez turn the phone over to Aurea, who confirmed that she really did not know any more than Narvaez had already told Caracappa. (GX 16).

Thus, as evidenced in compelling fashion by the telephone calls, Narvaez willingly and actively kept the heroin deal and conspiracy alive, furthered it, and showed as sub-

* Aurea was apparently present throughout the conversation and eventually spoke to Caracappa on the phone.

Indeed, at the very outset of the recorded conversation, there is a pause, as noted in the transcript. (GX 16). Before this Court, Narvaez interprets that pause as "an apparent consultation with his wife. . . ." (Narvaez Br. 77). Whether the pause in fact represents such a consultation or just a moment of thought on Narvaez' part, the significant fact is that, despite Caracappa's specific request for Aurea, Narvaez did not turn the phone over to his wife, but chose to speak to Caracappa himself.

** Narvaez urges that his reference to his co-conspirators in the third person, as "they" shows somehow that he was not one of the group. (Br. 16-17). In fact, however, it was the practice of Juan and Aurea and the others, except for rare lapses, to refer to their co-conspirators in the third person as "the people" or "they" or "the lady" or "the connection." (E.g., Tr. 86; GX 10A-10D, 20A-20F).

stantial knowledge of the relevant events as either Aurea or Juan.*

* Narvaez, before this Court, distorts a remark in summation by the prosecutor that, "You may find, based on your common experience that [appellant] might have had a much bigger role in this case than the evidence we have shows," claiming in that remark a concession of the weakness of the Government's case. (Br. 22). Narvaez thus ignores the prosecutor's following remark that, "... if you stick just with the conversations, ... and draw no inferences from that beyond the conversations themselves, you find that here is a man who is keeping that transaction alive and furthering that transaction at a critical time in the course of events here." (Tr. 824; emphasis added). Then again, in his rebuttal summation, the prosecutor emphasized that the Government was not relying on any conclusion by the jury that Narvaez was "the big boss," but was relying on "the direct evidence, on the taped conversations." (Tr. 923).

Nor was the prosecutor's remark, to which Narvaez' trial counsel, Mr. Lipson of the Federal Defender Services Unit, made no objection, any "improper invitation to the jury. . ." (Br. 22). Placed in context, the remark expressly referred to the facts, all part of the record before the jury, that (1) Narvaez was Aurea's husband, (2) he had not been at the Francesco's meeting, although Juan and Lugo had both brought their wives, (3) this was a first, and therefore somewhat risky, transaction by Aurea with the detectives, and (4) Narvaez' phone conversations had come at a crucial point in the chain of events. (Tr. 814-15). Thus, the prosecutor suggested that the jury might infer that Narvaez intentionally stayed away from the Francesco's meeting and was "using Aurea Vasquez" and acting through her. (Tr. 814).

As to this requested inference, it may be noted that Narvaez presented no evidence and thereby rejected the opportunity to show, for instance, that he had been elsewhere engaged and had therefore forgone the dinner at Francesco's. As Judge Friendly observed in *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 828 (1974):

"[T]he self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version."

That situation differs essentially from the circumstances shown in *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963), which, contrary to Narvaez' contention (Br. 20), was not "distinguished . . . by arguing it was no longer of any vitality" in Judge Pierce's denial of the defendant's motion to dismiss. What Judge Pierce rejected was "the manner in which you [Narvaez's counsel] just interpreted *Cianchetti*." (Tr. 655). The court properly distinguished *Cianchetti* from the present case, stating (Tr. 654-55) :

"But looking at *United States versus John Cianchetti*, 315 Fed. 2d 584, Second Circuit, 1963, and particularly on page 588, I find it noteworthy that the opinion states, "From the 1st in December 1960, *Cianchetti* disclaimed any intention of buying heroin from Warracha because of his fear he was under surveillance in connection with a pending deportation proceeding." He disclaimed participation, despite this other involvement. A part of the evidence that was presented and the evidence in chief was his disclaimer.

"We have no equivalent disclaimer here. . . .

"At the time of these telephone conversations Narvaez never said, other than, "I don't know," which was offset by statements indicating quite to the contrary, that he did know enough to be able to communicate this, that and the other, whether it was on, whether it was likely to be on in the future. At no time did he say, "I don't know anything about this. Don't talk to me. You had better get in touch with Aurea if that's who you are dealing with in connection with anything." No disclaimer of that kind here. I think that's a substantial distinction between *Cianchetti* and this case, Mr. Lipson."

Further, the distinction made by Judge Pierce between the present case and *Cianchetti* * applies with equal force to distinguish the present case from *United States v. Steinberg*, 525 F.2d 1126 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), upon which Narvaez also relies. (Br. 15, 21). In *Steinberg*, the appellant Kaye, "... unequivocally dissociated himself from the [narcotics] venture and four days later reiterated to Steinberg that he wanted nothing to do with it." 525 F.2d at 1134.

Here, it would have been the simplest of matters for Narvaez to have said to Caraccappa that Aurea wasn't home and then to have hung up. There was no pressure on Narvaez to do otherwise. He had never even met Caracappa, and he, not Caracappa, initiated talk of the

* Contrary to Narvaez's argument, (Br. 18-20), the District Court was also correct in its view of *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974) and *United States v. Purin*, 486 F.2d 1363 (2d Cir. 1973), *cert. denied*, 416 U.S. 987 (1974), which both present striking factual parallels to this case.

Thus, DaSilva in *Purin*, like Narvaez here, functioned purely as a communications conduit and was not present for subsequent negotiations and cocaine deliveries between Government agents and the supplier with whom they communicated through DaSilva. While DaSilva's words differ from Narvaez', we respectfully submit that Narvaez' function in preserving the agreement and negotiations here was fully as important as the function of DaSilva in initiating negotiations in *Purin*.

Likewise, in *Torres*, this Court emphasized that the evidentiary value of Torres' "single act" of agreeing to deliver one-eighth kilogram of heroin on February 14, 1972 "... is correspondingly greater [in a 3-month conspiracy involving four known parties, one transaction and two attempted sales] than it would be in a broad conspiracy: the single act or transaction forms a larger proportion of the entire scheme." 503 F.2d at 1124. Here also, by the standard of *Torres*, this was a "conspiracy of small scope" and the importance of Narvaez' conversations was therefore "correspondingly greater."

heroin deal. Had Narvaez simply issued a disclaimer or said nothing and hung up, he would not have been a defendant in this case. The fact that Narvaez rejected the option of not talking to Caracappa, when that option was so readily available, however, was properly considered by Judge Pierce and by the jury in fixing Narvaez' intent.

It was also for the jury ultimately to pass upon Narvaez' argument that Aurea was the criminal, and that he took no part in the conspiracy other than to live with Aurea. In *United States v. MacDougal-Pena*, 545 F.2d 833 (2d Cir. 1976), the defendant Pena accompanied Rotardier from the Virgin Islands to New York and there to a brokerage house during an attempt by Rotardier to pass securities stolen in St. Croix one day before the pair's departure. In New York, Pena shared with Rotardier accommodations at the Warwick Hotel and limousine service paid for by \$100 bills after the sale in Rotardier's name of coins stolen together with the securities in the Virgin Islands. Pena claimed that he had a homosexual relationship with Rotardier and "merely left when Rotardier did, as a wife would, and then simply accompanied Rotardier to New York." 545 F.2d at 835. This Court responded, "This is possible, but the jury could properly have believed that Pena knew what Rotardier was doing and was helping him." 545 F.2d at 835.

While, as this Court has noted, the question of sufficiency of the evidence is usually *sui generis*, *United States v. Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975), when measured against other cases, this one clearly meets the test of sufficiency. From Narvaez' own tape recorded statements, the jury was entitled to conclude that he knew the workings of the narcotics conspiracy and willingly provided his services as a communications link between the sellers and the buyers. He thus participated in the enterprise and attempted to further it toward its ultimate

illegal goal. *United States v. DiStefano*, *supra* at 1103; *United States v. Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). Thus, the District Court properly submitted this case to the jury and the jury's verdict was well-founded.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

MARTIN B. MCNAMARA,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARTIN B. McNAMARA being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

That on the **28th** day of **NOVEMBER, 1977**
he served a copy of the within **BRIEF FOR THE UNITED STATES**
by placing the same in a properly postpaid franked envelope addressed:

MARTIN ERDMANN, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SUCC UNIT
509 U.S. COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

And deponent further says that he sealed the said envelope
and placed the same in the mail chute drop for mailing at
One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Martin B. McNamara

Sworn to before me this

28th day of **November, 1977**

Steven K. Frankel
STEVEN K. FRANKEL
Notary Public, State of New York
No. 246207105
Qualified in Kings County
Commission Expires March 30, 1979

